



IN THE
Supreme Court of the United States.

THE UNITED STATES, <i>Appellant,</i>	}	No. 166.
<i>vs.</i>		
DIXON N. GARLINGER.		

Statement and Brief of Argument for Appellee.

STATEMENT.

The appeal in this case is taken by the United States, defendants in the Court of Claims, (No. 16,312) against whom judgment was rendered on the 18th of March, 1895, in favor of the Claimant (reformed November 25, 1895) for \$2,862. (Trans. 13.)

A motion in behalf of the United States for a new trial was disallowed on the 25th day of November, 1895. (Trans. 4.)

A subsequent motion for a new trial in behalf of the United States, filed March 19, 1896, was overruled, but an additional Finding of Fact was found (Trans. 14).

Dixon N. Garlinger, the Claimant, was appointed night inspector at the customs port of Baltimore and took the oath of office April 1, 1882. He entered upon the discharge of his duties at that time and so continued until August 25, 1886.

For his services during that period he was entitled to be paid \$3 per day for every day he was actually employed. (R. S. 2733 and 2738.)

During 1353 days of his term of service he was required to perform duty as night inspector from sunset to sunrise and until relieved by the day inspector; the length of time consequently varying, and sometimes extending from 5 P. M. of one day until 10 A. M. of the following day; being required to perform two watches (the night being divided into two watches) without being relieved from duty the following night, as required by regulations of the Secretary of the Treasury, hereinafter referred to, and except as stated in the Findings of Fact. (Finding III, Trans. 5).

Prior to, at the time, and since the time he entered into service, the following regulations were in force and were, *inter alia*, handed to him for his guidance:

“ART. 420. The night watchmen shall be divided into two watches, as nearly equal as possible, both watches to perform duty every night. The surveyor of the port will, however, make such changes in the division of the watches as he may deem expedient, and will appoint the hours of duty for the different watches.

“Whenever it is necessary to assign a night watchman to a vessel, or to any other ‘all-night’ charge, the night watchman so assigned must remain on the vessel, or on his charge, until relieved, and he will be excused from performing any duty the following night.

“Night watchmen must not quit their charge on being relieved without first making their presence personally known to the officer relieving them. Night watchmen, when on duty, must wear their official badge.”

These regulations were contained in "Laws and Regulations" for the government of officers of customs under the superintendence and direction of Surveyor of Ports (1877) issued by the Secretary of the Treasury to the Custom House authorities of all the ports, including the port of Baltimore, and were in operation in all the principal ports, except Baltimore, in which the practice of the ports at the time of claimant's appointment was not, and had not been, in accordance with the requirement of the regulations making two night watches and relieving the first night watch at midnight. (Findings VII and VIII.)

The "Laws and Regulations for the Government of Customs Inspectors, Weighers, Gaugers and Measurers," etc., (1883) do not specifically require the division of the watches, but Sec. 408 contains *inter alia*, the following provision:

"Whenever it is necessary to assign a night inspector to a vessel, or to any other 'all-night' charge, the night inspector so assigned must remain on the vessel, or on his charge, until relieved, and he will be excused from performing any duty the following night." (Finding IX.)

During the period of Appellee's employment he was paid for 1608 days, at \$3 a day, of which 1353 payments were for night service, when he was present rendering actual service, and 255 were for night service, when he was absent and off duty. (Finding II.)

One hundred and forty-four days were barred by the statute of limitations. (Finding IV.)

The Court deducted from 1353 days of night service the 255 days he was off duty, leaving 1008 nights in which he served both the first and second watches, without being relieved from duty the following night. From this last amount was deducted the 144 days barred by the statute of limitations, leaving 954 days at \$3 per day, as the basis for the judgment of \$2,862.

Subsequent to the judgment, the United States moved for a new trial on the ground that "General Regulations under Customs and Navigation Laws" (1884) contained no provision for separate watches for night inspectors and as a consequence prior regulations were repealed. The motions were overruled, but an additional Finding X was made. (Trans. 14.)

Argument.

The main question in this case is whether one watch of a night inspector, as fixed by the Regulations of 1877, Art. 424, (Finding VIII, Trans. 11) constitutes a day's work?

Is it a legal day's work by regulation?

Is it a day's work established by custom?

Is it a day's work established by legislative approval?

Regulations.

It is well settled that regulations issued by the head of an executive department, made in accordance with law, have the force and effect of law, are in fact law.

When Congress permits the order of the executive head of a department to be formulated as reg-

ulations and published, when so published and carried into effect, the legislative ratification must be implied. *Maddux case*, 20 C. Cls., 103; *Stotesbury case*, 23 C. Cls., 292; *Ex parte Reed* 100 U.S., 13; *Gratiot vs. U. S.*, 4 How., 80.

The Secretary of the Treasury, under and by virtue of Sec. 251, R. S.,

“—has the power to prescribe rules and regulations, not inconsistent with law * * * in carrying out the provisions of the law relating to raising revenue from imports, or to duties on imports, or to warehousing,” etc.

The regulations referred to, and quoted from in Findings VII and VIII (Trans. 5 and 6) were issued by the Secretary of the Treasury, formulated, published and carried into effect as “Laws and Regulations for the Government of officers of Customs under Superintendence and direction of Surveyor of the Ports.” (See Regulations, 1877).

The regulations quoted from in Finding IX (Trans. 6 and 7) were also issued by the Secretary of the Treasury, formulated, published and carried into effect as “Laws and Regulations for the Government of Customs Inspectors, Weighers, Guagers and Measurers,” etc. (See Regulations, 1883).

These regulations were in accordance with the law empowering the Secretary of the Treasury “to prescribe rules and regulations * * * in carrying out the provisions of the law relating to raising revenue from imports,” etc.

One Watch By Regulation Constitutes A Day's Work Actually Performed.

The regulations of 1877 which, with those of 1883, remained in force during Appellee's entire service, directed that the night inspector force should be divided into two watches to perform duty every night—the surveyor of the port to appoint hours of duty.

When necessary to appoint an inspector to an all-night duty, then such inspector was to be relieved from duty the following night.

By such regulation, what constitutes a day's work is necessarily specified. His work is at night, and the duty imposed upon him is one watch at night. He is relieved from duty on the following night, when he is on both watches, on the ground that he has in one night performed two days' work. He is not required to work 24 hours. Men work under contract; in this case the regulations take the place of and *are* the contract. In the *Martin case*, 94 U. S., 400, this court held that the Government could contract for a day's work of more or less than 8 hours. It is true that this was decided in construing the "eight hour law," but it is a principle of general application.

The Court say in that case:

"There are some branches of labor, connected with furnaces, foundries, steam or gas works, where the labor and the exposure of eight hours a day would soon exhaust the strength of a laborer, and render him permanently an invalid. The Government officer is not prohibited from knowing these facts, nor from agreeing, when it is proper, that a less number of hours than eight shall be accepted as a day's work."

It is well recognized in such employment that *two* days' work may be performed in the same 24 hours. A day is frequently divided into three "shifts" or periods of eight hours each, especially in mines and large factories. When a man works two "shifts," he is paid for two days' work.

Where a person is entrusted with an office, the Government is entitled to the time required and fixed for the performance of the duties imposed. If the employment is by the day, two days' work for one day's pay can with no more justice be required than two years' work could be required for one year's pay.

A man must perform the duties imposed by law and regulation. He may do other work, perform other duties, even hold another office, and be entitled to compensation or salary therefor, as well as for the salary attached to the original appointment. *Collins*, 15 C. Cls., 22; *Landrum*, 16 *id.* 83; *Hedrick*, 21 *id.*, 451; *Bartolett*, 25 *id.*, 389; *Converse*, 21 How. 463; *Saunders*, 120 U. S., 126.

By Custom, Usage, and Departmental Construction, One Watch Constitutes a Day's Work.

The Laws and Regulations for the government of officers of Customs under the superintendence of the Surveyor of the Ports, of 1877, issued by the Secretary of the Treasury to the Custom house authorities of all ports, including the port of Baltimore, were in operation in all of the principal ports except Baltimore, in which the practice of the ports at the time of appellee's appointment was not, and had not been in accordance with the regulations making two night watches and relieving the first

night watch at midnight. (Finding VII, Trans. 5 and 6.)

Baltimore has always been regarded as one of the principal ports, and is so enumerated in the Statutes. In Sec. 2653, R. S., the following ports are named in contradistinction to subordinate ports, viz: Boston, New York, Philadelphia, Baltimore, Charleston, Savannah, and Portland in Maine.

In all the principal ports of the United States, one watch was and is regarded and paid for as a day's work. One watch was therefore, not only by regulation, but by custom and usage, regarded as a day's work, with the further custom and usage that, where all night duty was performed, the person so performing it was excused from duty the following night.

Whilst a custom or usage may not have the full force and effect of law, and must not be repugnant to established law, yet it is an aid in the interpretation of the law. *Barbecker v. Robertson*, 152 U. S., 373; *Maddock v. Mayone*; 152 U. S., 368; *Sage v. Wilcox*, 6 Conn., 81; *Dublin case*, 38 N. H., 512.

In the interpretation of the law or a contract, a usage need not be ancient. *Cole v. Skrainka*, 17 Mo., App., 427; *Rindskoff v. Barrett*, 14 Iowa, 101; *Blin v. Mayo*, 10 *id.*, 36; *Parsons on Contracts*, 540.

It therefore follows that where, by regulations including Baltimore the performance of one watch is regarded as one day's work, the performance of two watches must be regarded as two days' work.

Were there any ambiguity in 261 R. S., as to the power of the Secretary of the Treasury to make the

regulations fixing a single watch as a day's work, the uniform construction given to the statute would control. This is so well recognized that it is not necessary to cite authorities.

The recognition of the rule or fact that one watch constitutes a day's work actually performed applies with as much force to Baltimore as to Boston, New York or Philadelphia.

That the same person should perform two watches and be paid for two day's work is immaterial. His honor, Chief Justice Nott, in this case (Trans. 10) says :

"If the Government had employed two inspectors to do the work of two, and had given the inspectors on duty through two-night watches, the alternate nights of rest assured to them by the regulations, the result in money would have been the same, as that now reached in the decision of this case."

As further determining the usage of the Customs Department in fixing one watch as one day's service, the court is referred to Catalogue 916 (Trans.7).

This catalogue is found by the court as part of the regulations. It shows a division of the service in two watches. This blank was framed for all customs ports, including Baltimore. It was distributed to all ports, including Baltimore. It indicates general custom and usage. It is submitted that, independent of any other regulation on the subject, the issuance of such blank under the authority of 2646, R. S., is in itself an authorization that the night inspector force should be divided into two watches, and is in itself a regulation to the effect that one watch should be regarded as one day's work actually performed.

One Watch as a Day's Work has Received Legislative Approval.

Where regulations are formulated by order of an executive, published and carried into effect, the legislative ratification must be implied. *Ex parte Reed*; *Gratiot*; and other cases above cited.

Congress has for many years appropriated for the pay of inspectors, whose day's work was confined to one watch as one day's work, and where two watches were for any reason performed by any person, and he was released from duty the following night, for two days' work.

By regulations having the force of law, by custom and usage, and by legislative enactment, a single watch constitutes a day's work for a night inspector or watchman.

Pay.

The statute provides, and it is not a matter of dispute in this case, that the compensation or salary of Appellee as a night inspector was \$3 a day. It was so fixed by law. (Secs. 2733, 2737, R. S.)

The failure to appropriate does not deprive Appellee of his legal right to payment. An employee of the Government is entitled to the salary allowed by law and is not limited by the amount appropriated by Congress. *Graham's case*, 1 C. Cls., 380; *Langston*, 118 U. S., 389.

Authorities Cited by Defendant in the Court Below.

In the Court below the defendant's attorney cited: *Harrison*, 26 C. Cls., 259; *Post*, 27 C. Cls., 259; and *Martin*, 94 U. S., 400.

That these cases have no application whatever in the present case is conclusively shown in the opinions of Chief Justice Nott. (Trans., pp. 10, 11, 12.)

It may be said, in addition to those very able opinions, that Harrison claimed payment for work he did not perform; Post for a day's work of eight hours whether he performed it or not, and in Martin's case it was held that the eight hour law did not deprive him of a right to contract for more or less than eight hours as a day's work. In the present case, the contract consisted of the regulations, and the custom and usage fixing one watch as one day's work.

Regulations of 1884.

General Regulations under Customs and Navigation Laws of the United States, 1884, are silent as to the hours of service of night inspectors.

The defendants in the court below contended that, by reason of the legislation of 1884, the Regulations specially relating to officers under the superintendence of the Surveyor of Ports were repealed, and being repealed one watch no longer constituted a day's work by regulation.

The court found (Trans. 14), "It does not appear that the hours of service of night inspectors, or length of the night watches, were changed at any port of the United States subsequent to the promulgation of the 'General Regulations under Customs and Navigation Laws of the United States,' but on the contrary continued as set forth in Finding VII."

The court refused to find that the regulations referred to, and described in VII, VIII and IX Findings, were repealed.

The law does not regard the regulations of an executive department, made in pursuance of a statute, as a matter of evidence.

Such regulations have the force and effect of law—when formulated, published and acted upon are law—as any other law they may be cited, and when made in accordance with law are authoritative. *Caha vs. U. S.*, 152 U. S., 111.

As To Different Regulations.

There are several kinds of general regulations bearing upon the case at bar, which were considered by the court below.

One kind are "General Regulations under the Customs and Navigation Laws of the United States." These regulations are general in their character, but are specific in the enumeration of the *duties* of the customs and navigation officers. We cite as to the "General Regulations under the Customs and Navigation Laws" those of 1874 and 1884. One copy of such regulations is to be kept by each of the principal officers as the "standard copy," and is to be handed to his successor in office.

Besides these are what may be denominated pocket editions of general regulations for *governance* of officers under surveyor of ports. We cite as such the regulations of 1871, 1876, 1879 and 1883.

These are for the benefit and use of all officers. At the time Appellee entered upon his service as night inspector, he was furnished by his superior officers with a copy of the regulations promulgated by the Secretary of the Treasury for his *governance* and defining his duties. (Finding VI, Trans. 5.)

The regulations of 1877, relating to officers under direction of surveyors of ports, are substantially the same as those of 1871, so far as hours of service are concerned. But between 1871 and 1877, general regulations under the customs and navigation laws were promulgated by the Secretary of the Treasury, which were silent as to the special rules for the governance of officers under the superintendence of Surveyors of Ports.

The general plan of the regulations of 1884 follows those of 1874, and they were a revision of prior regulations. The General Regulations under Customs and Navigation Laws of both 1874 and 1884 are specific as to certain duties of night inspectors, but are silent as to governance. That the regulations of 1884 were not intended to supersede or repeal the specific regulations of 1883, as to what constituted a day's service of night inspectors, is evidenced by the action of the customs officer. The time of service was not changed, but on the contrary was continued through Appellee's term of office. (Finding X, Trans. 14.)

If regulations have the force and effect of law, and are in fact law, the rules of interpretation of statutes apply. When one statute is not specifically repealed by another they should be interpreted *pari materia*. The rule "that a repeal by implication ought not to be presumed unless from the repugnance of the provisions the inference be necessary and unavoidable," announced by Mr. Justice Story in *Hartford vs. The United States*, 8 Cranch, 109, has been strictly followed in numerous decisions of this Court. A general act is not to be construed

to repeal a previous particular Act. *Ex parte Crow Dog*, 109 U. S., 556; *State vs. Stoll*, 17 Wall, 425.

The court is referred to *Meyer vs. Western Car Co.*, 102 U. S., 1., in connection with the many familiar decisions relative to the construction of the Revised Statutes.

That the rules for the governance of night inspectors should be interpreted *pari materia* is as clearly established that one published set of rules only repeals prior rules to the extent that such prior rules are inconsistent therewith.

The "General Regulations" of 1874 do not define what constitutes a day's work for night inspectors. The regulations of 1871 for the governance of officers under surveyors of ports, fix a day's work as one watch. This rule, notwithstanding the general regulations of 1874, is followed in the specific regulations of 1876, 1877, and 1883. That the general regulations of 1874 were not held to repeal the regulations of 1871, when not inconsistent, is, it is submitted, abundantly proven, in connection with the facts that the same rule as to night watches was observed before and since 1884, and that the regulations of 1884 did not repeal or in any way change the regulations then existing as to the term of service of the night watch.

The Length of a Day's Work For a Night Inspector Does Not Necessarily Depend Upon a Written and Promulgated Regulation.

The law fixes the rate of a day's work for Night Inspectors. If the duration or length of the day is fixed by regulation made in accordance with law,

such regulation has the force and effect of law. In the case at bar, the rights of Appellee are established by both law and regulations.

But what constitutes a day's work may be proven by other evidence than laws or regulations.

In *Martin's case*, *supra*, the court based its decision, in part, on what was the ordinary custom and usage, both as to hours and payment of labor, both by the United States and private parties. The same rule is applicable here. Without taking into consideration the specific regulations directly pertaining to officials under the superintendence of surveyors of ports, the general regulations of 1874 and 1884 define the duties of all night inspectors. The character of such duties at all ports is the same—there is no distinction made. The rate of pay is established by law. The usage and custom as to what constitutes a day's work, in the absence of direct law or regulation, must control. Usage long established and followed has to a great extent the efficacy of law in all countries. *Sidell v. Grandijan*, 111 U. S., 412.

It is shown by Finding VII that one watch was recognized as a day's work in all the principal ports of the United States, and that the general directions of the Secretary of the Treasury applied to Baltimore.

Points in Appellant's Brief.

Specifically replying to points made in Appellant's brief, we submit:

1st. *That the Treasury regulations of 1874 did not constitute an express contract of employment.*

As before stated the regulations of 1874 are "General Regulations under Customs and Navigation Laws." These regulations are silent as to what constitutes a day's work for night inspectors. They apply more especially to his duties.

The hours of work, and what constitutes a day's work, are defined in "Laws and Regulations for the Government of Officers of Customs under the Superintendence and Direction of Surveyors of the Port, 1871 and 1877."

It is not contended that, as a general rule, acts fixing the salary of public officers may not be changed or repealed. But so long as they are unrepealed, the contract for payment of services performed remains in force. In *Butler v. Pennsylvania*, 10 How., 402, where the right of the legislature to change a fixed salary by subsequent law is affirmed, it is also declared, "the promised compensation for services actually performed and accepted, during the continuance of the particular agency, may undoubtedly be claimed."

An officer is entitled to the statutory salary although, during the continuance of his office, an appropriation is made for a less amount than that fixed by prior law. *U. S. v. Langston*, 118 U. S., 389. The cases are very numerous where suits have been prosecuted in the Court of Claims for salaries of public officers and in this Court considered on appeal.

A contract may be established by a statute. Whether such contract may be abrogated prospectively depends on circumstances. Treaty obligations with Indians, when prospective, may not be abrogated.

In the case at bar, what constituted a legal day's work was fixed by regulations having the force of law.

In *Adams v. U. S.*, 20 C. Cls., 117, the court says:

"The law creates the office, prescribes its duties, and fixes the compensation. The selection of the officer is left to the collector and Secretary. The appointing power has no control, beyond the limits of the statute, over the compensation, either to increase or diminish it. This has been substantially decided in many cases.

"(*Converse v. U. S.*, 21 How., 463; *U. S. v. Williamson*, 23 Wall., 411; *U. S. v. Lawson*, 101 U. S. R. 164; *U. S. v. Ellsworth*, 101 U. S. R., 170; *Hall v. Wisconsin*, 103 U. S. R., 5; *Allstedt's Case*, 3 C. Cls. R., 284; *Patton's Case*, 7 C. Cls., R., 362; *Sleigh v. U. S.*, 9 C. Cls. R., 369.)"

In the case at bar, the regulation fixing a day's work was not changed, altered or modified.

2nd. The Appellant's, under head 111, assert that *the facts in this case negative an implied promise to pay any additional sum beyond the statutory rate.*

Nothing is claimed beyond the statutory rate. The claim is made under R.S., 2733 and 2738. The pay is fixed at a *per diem* compensation. The regulations determine what is a day's work.

3rd. The Appellant claims (IV) *that even if there is a breach of contract, no recovery could be had beyond the sum allowed.*

The law fixes claimant's compensation at \$3 per day. He is entitled to be paid for the number of days he worked. The failure to appropriate does not affect his right to pay for work actually performed. Nothing is claimed beyond the statutory rate.

4th. Appellant claims that *there is no obligation on the appellants arising ex lege, or quasi ex lege, because the Treasury regulations of 1874, if they are to receive the construction placed upon them by the court below, are in conflict with law, and null and void.*

The fact that 2737, R. S., permits the Secretary of the Treasury to increase the salary of inspectors to \$4 per day and therefore a night inspector's salary should not exceed \$4, has no bearing in this case. The same argument, if argument it is, would apply where the salary is limited to \$3.

It all depends on what constitutes a day. As applied to a day's labor, a "day" in a statute does not mean 24 hours, or a calendar day. For mechanics, laborers and workmen, it means eight hours. For letter carriers it means eight hours. In *Martin's case, supra*, the number of hours that constitute a day's work depends upon the contract. It may be greater or less than eight hours. Adopting the rule in *Benson v. Adams*, 69 Ind., 353, that the day commences at 12 o'clock P. M. and ends at 12 o'clock P. M., then the night inspector worked each calendar day, the division of time being different, one day working from 5 P. M. to 12 P. M., and the next day from 12 P. M. to 7 A. M. It would be the equivalent of working each day from 9 A. M. to 4 P. M., and that might constitute a day's work under the decision in *Martin's case, supra*.

The claim here is for neither extra service, extra compensation, or perquisites; it is for legal day's work actually performed.

5th. Appellants claim that *the construction placed upon this regulation is erroneous.*

Harrison's case and Martin's case, supra, have been fully considered by the Court below. Harrison claimed pay for work he did not do, and Martin claimed pay for work included in his contract. The question here is entirely different. If one watch constitutes a day's work, and it is so fixed by regulations having the force of law, then the value of that day's work is fixed by law and claimant is entitled to be paid accordingly.

6th. Appellant claims that *the Court below erred in refusing to insert Treasury regulation of 1884 in the Findings of Fact, or else in inserting those of 1874, and in founding a judgment thereon.*

Regulations made in accordance with law are not evidence. They have the force and effect of law. Of regulations this court will take judicial notice. *Caha vs. United States*, 152 U. S., 111.

The Court below found parts of certain regulations pertinent to the issue, as facts.

The Appellant asked that the whole body of other regulations be found for the purpose of showing that they did not contain regulations quoted. Of them this court, if relevant, will take judicial notice.

The Appellants are again in error in stating that the present claim is founded on the regulations of 1874. Such regulations were not quoted in the Findings.

7th. Appellant claims that *the court below erred in holding that the regulations of 1874 continued in force at any time subsequent to March 24, 1883.*

Appellants are again in error. The regulations of 1874 contain no reference whatever to the hours which constitute a watch.

Regulations for the government of officers of customs were adopted in 1871. (See Regulations). These were substantially re-adopted in 1877. The General Regulations under the Customs and Navigation Laws were silent as to the governance of night inspectors. These rules were provided for another and different set of regulations.

In the different regulations there was nothing inconsistent with the general regulations, a copy of which was to be kept in the office of the collector of the port and handed to his successor.

The silence of the regulations of 1884 has no more effect on the regulations of 1883 for the government of custom inspectors, etc., (Find. IX., Trans. 6) than had the silence of the regulations of 1874 on the regulations of 1871, promulgated for the same purpose.

The regulations after 1883, as those prior thereto, were construed as authorizing two watches in the principal ports of the United States, so that where, for any reason, a party was required to perform all night duty ; he was relieved from duty the following night. Baltimore was the exception where the regulations were not observed.

It being established by law, regulations, usage and custom, that eight hours constitute a day's work for a night inspector, it is respectfully submitted that the judgment of the court below should be affirmed.

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